Criminal Law Symposium

Jury Management

Faculty

Hon. Richard Ryan Lamb
9th Circuit Court
Kalamazoo, Michigan
(269) 383-8916
rrlamb@kalcounty.com

Michigan Judicial Institute
Michigan Hall of Justice
P.O. Box 30205
Lansing, Michigan 48909
(517) 373-7171

JURY MANAGEMENT

Judge Richard Ryan Lamb
Criminal Law Symposium – Lansing, Michigan
October 20, 2005

I. Management begins when a case arrives on the court's docket. Jurors are entitled to effective use of their time as jurors.
   A. Use pretrial orders, the Jury Board and pretrial conferences to identify potential delays at trial. MCR 2.401, 2.402, 6.004, 6.610
      1. Qualifications of jurors – MCL 600.1307(a), MCL 600.1312(e)(f)
      2. Establish an estimated length of trial and number of witnesses
      3. High publicity cases and 404b issues – require the proponent of the evidence to make a written offer of proof of factual allegations and written specificity of the purpose of offering the evidence under 404b.
      4. Criminal Sexual Conduct cases
      5. Photographs
      6. Joint trial and joint defendants – People v Pipes, COA No. 247718, unpublished, May 31, 2005; People v Key, COA No. 247719 unpublished, May 31, 2005 (joint trial and joint defendants)
      7. Motions in limine
      8. Jury instructions
      9. Voir Dire – court, counsel or combination?

II. Conducting voir dire MCR 2.511, MCR 6.412.
The function of voir dire is to elicit sufficient information from prospective jurors to enable the Trial Court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. People v Sawyer, 215 Mich App 183, 186; 545 NW2d 6 (1996).
   A. Investigate juror hardship first
      1. Address juror sensitivities vis a vis type of the case being tried
      2. Criminal cases – photographs, CSC cases, youthful defendants, graphic testimony
      3. Civil cases – multiple parties, medical malpractice, knowledge of doctors or treatment at hospitals, photographs or graphic testimony
   B. Explain function of court and jury. Explain to the jurors that they will become judges of the facts. Explain fundamental concepts in criminal cases and civil cases
      1. Criminal cases
         a. Presumption of innocence
         b. Burden of proof
         c. Privilege against self-incrimination
         d. Proof beyond a reasonable doubt
         e. Verdict by jury must be unanimous
         f. Address CSI expectations
      2. Civil cases
         a. Money damages

b. Proof by a preponderance of the evidence
c. Verdict established by five of six jurors

C. Conduct bench voir dire questioning and/or chambers voir dire with individual jurors only as necessary.

III. Juror note-taking and questions from jurors

A. Juror note-taking CJI 2d 2.17, CJI 2d 2.18

1. Note-taking before addressed by court rule. Note-taking was within the discretion of the trial court to allow jurors to take notes and use them during their deliberations. People v Donnell Young, 146 Mich App 337 (1985).
2. MCR 6.414(C) amended eff. 1/1/06
   a. The court may permit note-taking regarding the evidence
   b. If note-taking is allowed, the court must instruct the jurors that they need not take notes and note-taking should not interfere with the juror's attentiveness
   c. The court must instruct jurors both to keep their notes confidential except as to other jurors and to destroy their notes when the trial is concluded
3. MCR 6.414(A)(D) eff. 1/1/06
   a. MCR 6.414(A) Before trial begins, the court should give the jury appropriate pretrial instructions.
   b. MCR 6.414(D)
      i. Juror notes are to be kept confidential except as to other jurors during deliberations
      ii. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations the court must so inform the jurors at the same time it permits the note-taking
      iii. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded

B. Questions from jurors. CJI 2d 2.9

1. Allowing questions from jurors is a matter within the discretion of the court and a defendant claiming that a trial court erred in permitting jurors to submit questions must show that the trial court abused its discretion. People v Heard, 388 Mich 182 (1972)
2. MCR 6.414(E) eff. 1/1/06 the court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that parties have the opportunity to object to the questions.
3. Questions should be regarding the evidence, in writing, reviewed by counsel and subject to the rules of evidence. See *The Case for Allowing Jurors to Submit Written Questions* by Eugene A. Lucci, Judicature volume 89, number 1 July/August 2005

IV. Misconduct of jurors

A. Misconduct of jurors can occur when the jurors violate the court's instructions. The misconduct can occur during the trial, during the deliberations and may be discovered after the verdict has been entered.

B. Some examples of juror misconduct during trial and deliberations include:
   1. Discussing the case with other jurors before instructions
   2. Visiting the scene
   3. Utilizing dictionaries or other resources in the jury room
   4. Conducting independent investigations by utilizing the internet and/or cell phone

C. After the verdict has been entered misconduct can occur and/or be alleged. Jurors can disclose the jury deliberations, the vote and attempt to impeach the verdict of the jury.

D. The theory of jury nullification is an extreme example of juror misconduct. A juror's refusal to follow the law is misconduct. A thorough discussion of jury nullification is found at US v Thomas, 116 F3d 606 (1997); 204 F3d 381 (2000).

E. Addressing misconduct. Jurors should be instructed how to avoid potential misconduct.
   1. CJI 2d 2.16 prohibits visiting the scene or making an investigation or conducting an experiment. A more comprehensive jury instruction is suggested for criminal trials. The suggestion is: From this point, until your verdict is entered in open court, you may not discuss the case with anyone, except during jury deliberations, conduct any investigation or use the internet or cell phone for independent research. You may not use any material in your deliberations except that provided to you by the court. If any juror violates this instruction or any other instruction, all jurors are under a duty to report the violation to the court immediately.
   2. Two proposed amended civil jury instructions address this issue. M Civ JI 2.07 and M Civ JI 60.01. I suggest that the word "immediately" follow the instruction on reporting violations to the court.

F. When any misconduct by the juror or by the court is alleged, an evidentiary record should be made. People v Olszewski, COA No. 247776, unpublished, November 30, 2004.

G. A court has discretion to dismiss a juror during trial or deliberations based on misconduct, illness, or other valid reason. People v Mason, 96 Mich App 47 (1980)

H. The fact that the jury violated an instruction against discussing the case before the close of proofs, is not in and of itself, grounds for a new trial. People v Harris, 190 Mich App 652 (1991).

I. Some showing must be made that juror misconduct prejudiced the defendant's right to a trial before a fair and impartial jury. People v Fox, 232 Mich App 541 (1998).

STATE OF MICHIGAN 9TH CIRCUIT COURT KALAMAZOO COUNTY	CRIMINAL CASE SCHEDULING ORDER	CASE NO.

Court Address
TRIAL DIVISION - 227 W. MICHIGAN AVENUE, KALAMAZOO, MI 49007

Court Telephone No.
(269) 383-8837

PEOPLE OF THE STATE OF MICHIGAN	v	Defendant's Name

THIS ORDER AND THE "ARRAIGNMENT REPORT ORDER LIMITING TIME FOR MOTIONS AND NOTICES"/"WAIVER OF ARRAIGNMENT AND ELECTION TO STAND MUTE" CONTROL THE PRETRIAL AND TRIAL PROCEEDINGS IN THIS CASE. THIS ORDER IS THE ONLY NOTICE YOU WILL RECEIVE FOR THE PRETRIAL CONFERENCE, SETTLEMENT CONFERENCE AND TRIAL DATES.

IT IS HEREBY ORDERED:

1. **DATES.**
   PRETRIAL CONFERENCE DATE/TIME: _____@ 11:00 A.M.
   Pending issues, discovery and settlement will be addressed at the pretrial conference. Defendant must be present if not in custody. If defendant is in custody and resolution is anticipated, defense counsel shall request his/her presence, and the prosecutor will prepare and present any necessary writs. Pre-plea requests must be submitted to the judge by the pretrial conference, and all pre-plea presentence reports must be completed by the settlement conference.
   SETTLEMENT CONFERENCE DATE/TIME: _____@ 1:30 P.M.
   Parties and the attorney who will conduct the trial must be present for the settlement conference. Counsel will score the sentencing guidelines prior to the settlement conference and advise the court if there is disagreement on the scoring.
   TRIAL DATE/TIME: _____@ 9:00 A.M.
   Trial will be by jury unless waived by the defendant. Defendant's counsel will promptly notify the court if the defendant intends to waive a jury trial.

2. **INCARCERATION ISSUES.** The parties are responsible for notifying the court if there are 180-day prison issues or six-month bond issues. The prosecuting attorney will prepare and present any writs necessary for appearance of the defendant for trial or other proceedings. Defendant's attorney is responsible for notifying the court and the prosecutor if the defendant is unavailable for trial on the scheduled date. Defendant's attorney will request that the defendant be transported to the court when necessary.

3. **WITNESSES.** The parties will notify the court and opposing counsel immediately of any known witness problems. Otherwise, the court will assume the case is ready for trial on the scheduled date. Defense attorneys will prepare and present any writs necessary for incarcerated defense witnesses.

4. **MOTIONS.** Any motion requiring a hearing longer than 15 minutes will be scheduled on an Evidentiary Hearing Day scheduled through the criminal assignment clerk. Shorter motions may be scheduled on the court's Motion Day criminal docket. Counsel are responsible for the timely filing and scheduling of motions.

   Motion practice is governed by MCR 2.119. A motion or response to a motion that presents an issue of law must be accompanied by citation to the authority on which it is based. MCR 2.119(A)(2). Time for service and filing of motions and responses is governed by MCR 2.119(C). A copy of all motions and responses and accompanying authority shall be simultaneously provided to the judge's law clerk.

   Motions to impeach shall be scheduled for the day of trial unless otherwise ordered by the court.

5. **STATEMENTS.** The prosecutor will promptly provide defense counsel with a copy of any oral or written statements of the defendant that are not included in the police report intended to be used at the time of trial.

6. **DISCOVERY.** MCR 6.201 governs discovery. Discovery in this case must be completed not later than 28 days before trial.

Whether or not discovery has been requested, the prosecutor's exhibits and law enforcement reports will be made available upon request of defense counsel. Unless covered by a discovery request, defense counsel is responsible for contacting the prosecutor to determine if there are any substantive additions to the police report initially provided to defense counsel. Unless covered by a discovery request, defense counsel is responsible for obtaining and reviewing any additional documents.

7. **PRIOR CONVICTIONS.** Defendant's challenge to prior convictions noticed by the prosecutor shall be made in writing, not later than the date of the settlement conference. If no such objection is filed, the prior convictions are deemed admitted.

8. **TRIAL.**
Exhibits: By 9:00 a.m. on the date of trial, all exhibits shall be marked by the attorneys and dated with the first date of the trial. Exhibit stickers may be obtained from the court. The attorneys will obtain an "Exhibit Log" from the court, complete it and return it to the law clerk on the first day of trial.

Jury Instructions: Jury instructions are due at 9:00 a.m. on the second day of trial. The original stapled copy and an unstapled copy shall be handed to the judge's law clerk at that time. Jury instructions are to be typewritten in full, with all blanks completed and all inappropriate options deleted. Reasonable amendment of jury instructions will be permitted as the trial progresses.

Voir Dire: Unless otherwise ordered by the court, the voir dire will be conducted by the court. The court in the exercise of its discretion may allow each party up to 30 minutes of voir dire. Parties whose interests are essentially identical will be treated as a single party for purposes of this limitation. MCR 2.511(C)

Opening Statements and Closing Arguments: Unless otherwise ordered by the court, each party's opening statement will be limited to 30 minutes. If parties' interests are essentially identical, they will have a total of 30 minutes for an opening statement. Unless otherwise ordered by the court, closing arguments for each party shall not exceed 45 minutes. Parties whose interests are essentially identical will have a total of 45 minutes. The prosecutor may have an additional 10 minutes for any rebuttal.

9. **ADJOURNMENT.** All requests to adjourn shall comply with MCR 2.503(B). Any request for adjournment of the trial date shall be made through the Criminal Assignment Clerk no later than fourteen (14) days before the date scheduled for trial. After that, requests to adjourn must be approved by the trial judge. Cases that do not proceed to trial on the day scheduled will be adjourned to 9:00 a.m. the following day, unless the trial judge sets another date through the assignment clerk.

10. **SANCTIONS.** The contents of this order shall control the course of the litigation in this matter. Failure to comply with the requirements of this order may result in sanctions.

11. **OBJECTIONS.** Any objections or corrections to this order shall be filed with the court within 14 days from the date of this order.

12. **STATUS CONFERENCE.** On the request of any party, the court may schedule a status conference to consider modifications to this order or resolution of this case. If a status conference is requested, counsel are responsible for scoring the sentencing guidelines before the status conference.

Dated: October 11, 2005

Richard Ryan Lamb, Circuit Judge

CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this order to counsel for the parties and any pro per party by ordinary mail.

Dated: October 11, 2005

Circuit Court Assignment Clerk

STATE OF MICHIGAN 9TH CIRCUIT COURT KALAMAZOO COUNTY	CIVIL PROCEEDINGS SCHEDULING ORDER MCR 2.401	CASE NO. JUDGE:

Court Address
TRIAL DIVISION - 227 W. MICHIGAN AVENUE, KALAMAZOO, MI 49007

Court Telephone No.
(269) 383-8837

Plaintiff	v	Defendant

THIS ORDER CONTROLS THE PRETRIAL AND TRIAL PROCEEDINGS IN THIS CASE. THIS ORDER IS THE ONLY NOTICE YOU WILL RECEIVE FOR THE CASE EVALUATION, SETTLEMENT CONFERENCE AND TRIAL DATES.

IT IS HEREBY ORDERED:

1. **DATES.**
Case Evaluation Date: _____ MCR 2.403

Case Evaluation Fees: Plaintiff $75.00 Defendant $75.00
Payment is not due at this time. You will receive a Case Evaluation Notice designating due dates for payment of fees and submission of briefs.

Settlement Conference Date: _____ MCR 2.401

Parties and the attorney who will conduct the trial must be present for the settlement conference. If a party is insured, a representative of the insurance company, with ultimate settlement authority, must be present. Any settlement which limits the potential liability of any defendant at trial (such as a "high-low" or *Mary Carter* agreement) must be disclosed to the court.

Trial Date: _____ MCR 2.501
☐ Jury Trial ☐ Non-Jury Trial Jury Fee Paid: ☐ Yes ☐ No

2. **PLEADINGS.** The pleadings in this case are satisfactory. The pleadings may not be amended, nor may parties be added, except as provided by court rule or a stipulated order signed by the court. MCR 2.118 If a party is added after the date of this order, the party who caused them to be added shall serve them with a copy of this order with the initial pleadings served on the new party.

All parties and claims have been joined. MCR 2.203-207

3. **WITNESSES.** The plaintiff(s) will submit a witness list to all other parties, including expert witnesses, not later than 60 days from the date of this order. The defendant(s) will submit a witness list to all other parties, including expert witnesses, not later than 90 days from the date of this order. A party may identify their witnesses in response to a discovery request, if the disclosure is timely under this section of the order. The parties' list of witnesses shall include the witnesses they may call at trial. The list shall include the name, address or business address, and telephone number of the witnesses. Any witness not named on the list will not be allowed to testify at trial except in the discretion of the court for good cause shown. MCR 2.401(I). By an agreement, in writing, the parties may shorten or extend the witness disclosure deadlines, so long as that does not affect the motion deadlines or the dates scheduled for case evaluation, settlement conference, or trial.

4. **DISCOVERY.**
Deadline: Discovery (which includes timely responses under MCR and the actual taking of depositions) in this case must be completed not later than 42 days before the case evaluation date, above, unless the parties agree otherwise, in writing. Such agreements will not affect motion deadlines or lead to an adjournment of case evaluation, settlement conference or trial, unless approved by a court order. MCR 2.302(F).

Physical and Mental Examinations: Physical or mental examinations shall be completed 28 days before the discovery deadline, unless the parties agree otherwise, in writing.

5. **MOTIONS.** All dispositive motions must be scheduled and heard not later than 28 days before case evaluation, or they may be scheduled by the court to be heard at or following the commencement of trial. The court reserves the right to limit the number of dispositive motions before case evaluation in accordance with the Michigan Court Rules. Ordinarily, dispositive motions filed under MCR 2.116(C)(10) will not be heard until the conclusion of discovery or upon a demonstration that all relevant discovery has occurred on the issue addressed by the motion. All other motions must be scheduled and heard 28 days before trial. Legal authority shall accompany all motions. Briefs shall accompany all motions. If a motion is contested, an answer with brief must be filed. A copy of all motions and responses and accompanying authority shall be simultaneously provided to the judge's law clerk. MCR 2.119.

6. **TRIAL.**

Exhibits: Each party is to exchange a list and description of exhibits to be introduced at the time of trial not later than 7 days before trial. All exhibits shall be marked prior to the day of trial. Plaintiff(s) exhibits shall be marked with numbers and Defendant(s) exhibits shall be marked with letters. Each list of exhibits should describe those that are to be admitted without objection and those to which there will be an objection, noting by whom the objection is made and the nature of the objection.

Counsel shall agree as to the authenticity and admissibility of exhibits so far as possible. Except for good cause shown, the court will not permit the introduction of any exhibits, including exhibits to be used solely for the purpose of impeachment, unless they have been listed in the exhibit list or unless the necessity for the use of any particular exhibit reasonably could not have been foreseen.

Prior to the date of trial, all exhibits shall be marked by the attorneys and dated with the first date of the trial. Exhibit stickers may be obtained from the court. The attorneys will obtain an "Exhibit Log" from the court, complete it and return it to the law clerk on the first day of trial.

Bench Book ☐required ☐not required ☐optional : In addition to the formal list of exhibits, copies are to be made for opposing counsel and a bench book of exhibits prepared and delivered to the court 7 days before trial with adequate index. The parties shall meet and agree as to the exhibits to be contained in the bench book and the indexing of said exhibits.

Trial Briefs: All parties will submit trial briefs containing proposed issues of law. In non-jury trials, briefs must contain proposed findings of fact and proposed conclusions of law. These briefs shall be filed 7 days prior to trial and mutually exchanged.

The trial briefs of the parties shall address any and all legal issues, which will be brought before the court by the pleadings or the evidence. These matters shall be addressed in the briefs on both contested and uncontested issues. MCR 2.401(D)

Jury Instructions and Theory and Claim: Proposed jury instructions shall be delivered to the court's law clerk/bailiff and opposing counsel not later than 7 days prior to trial. Jury instructions are to be typewritten in full, with all blanks completed and all inappropriate options deleted. Counsel shall also submit a proposed theory and claim concisely setting forth in non-argumentative fashion their position on the issues in the case and the verdict they seek. The proposed theory and claim shall not exceed two double-spaced, typewritten pages in length, except as otherwise permitted by the court. The theory and claim is read to the jury along with the final instructions in the case. The court may edit proposed theory and claim for length or content. The parties may waive the theory and claim.

Voir Dire: Unless otherwise ordered by the court, the voir dire will be conducted by the court. The court in the exercise of its discretion may allow each party up to 30 minutes of voir dire. Parties whose interests are essentially identical will be treated as a single party for purposes of this limitation. MCR 2.511(C)

Opening Statements and Closing Arguments: Unless otherwise ordered by the court, each party's opening statement will be limited to 30 minutes. If parties' interests are essentially identical, they will have a total of 30 minutes for an opening statement. Unless otherwise ordered by the court, closing arguments for each party shall not exceed 45 minutes. Parties whose interests are essentially identical will have a total of 45 minutes. Plaintiff(s)

may have an additional 10 minutes for any rebuttal.

7. **ADJOURNMENT.** If a motion for adjournment of the trial date is necessary, the same shall be filed not later than 14 days prior to the scheduled trial date. If the trial is to be adjourned by stipulation, the stipulation shall be filed not later than 14 days prior to the trial date. A case is not adjourned unless and until the court enters an order adjourning the trial. Motions and stipulations for adjournment must conform with MCR 2.503.

8. **RESOLUTION.** It appears that the parties may be able to settle this matter if a settlement discussion takes place between all parties' counsel. **IF THE CASE IS SETTLED, THE PLAINTIFF'S ATTORNEY WILL IMMEDIATELY NOTIFY THE CIVIL ASSIGNMENT CLERK OF THE SETTLEMENT AND PREPARE AND PRESENT TO THE COURT A JUDGMENT OR PROPOSED ORDER DISMISSING THE CASE**. Only upon timely receipt of a judgment or proposed order of dismissal will the matter be removed from the trial docket.

9. **ALTERNATIVE DISPUTE RESOLUTION.** The parties are encouraged to consider the use of other alternative dispute resolution mechanisms to resolve this matter. There are a variety of conciliation, mediation and arbitration options. The court is willing to explore the available options with parties and counsel. If the parties choose to engage in any ADR process ancillary to the court ordered case evaluation process, advise the ADR Clerk (269-384-8255). Notification to the ADR Clerk assists with caseflow management and mandatory statistical reporting. Upon completion of any elective ADR process, please complete form 9CC-0222, *Alternative Dispute Resolution Report*, and return it to: ADR Clerk, 9th Circuit Court, 227 W. Michigan Avenue, Kalamazoo, MI 49007.

   Contact the ADR Coordinator at 269-384-8255 for an updated copy of *the Alternative Dispute Resolution List of Civil Mediators* (9CC-0225) and form 9CC-0222, *Alternative Dispute Resolution Report*.

   The court will not delay the deadlines and dates contained in this Scheduling Order because the parties are engaged in an elective ADR process.

10. **SANCTIONS.** The contents of this order shall control the course of the litigation in this matter. Failure to comply with the requirements of this order may result in sanctions.

11. **OBJECTIONS.** Any objections or corrections to this order shall be filed with the court within 14 days from the date of this order. MCR 2.401(B)(2)(c)(i)

12. **STATUS CONFERENCE.** On the request of any party, the court may schedule a status conference to consider modifications to this order. MCR 2.401(A)

13. **OTHER.**

Dated: _____ _____

, Circuit Judge

Copy: ADR Clerk
Attachments: Notice of Scheduled Proceedings
PROCIR Listing of Attorneys (attachment to original scheduling order only)

CERTIFICATE OF MAILING

I certify that on this date I mailed a copy of this order to counsel for the parties and any pro-per party by ordinary mail.

Dated: _____ _____

Circuit Court Assignment Clerk

STATE OF MICHIGAN

9TH JUDICIAL CIRCUIT COURT - KALAMAZOO COUNTY

* * * * * * * * *

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff Circuit Court File No.

V

,

Defendant. SCHEDULING ORDER
_____/

Jeffrey R. Fink (P31062)
Attorney for the People

Attorney for Defendant _____/

At a session of said Court held in the City
and County of Kalamazoo, State of Michigan
on this __ of _____, 200

PRESENT: HON. RICHARD RYAN LAMB, Circuit Court Judge

CHARGE: The Defendant, name ____, is charged with _____ MCL __ and _____ MCL _.

HABITUAL OFFENDER: The Defendant is alleged to be a ___offender and therefore subject to the provisions of the habitual or health code__ MCL __.

ARREST AND BAIL STATUS: The Defendant was arrested on date___. The Defendant is/is not __ currently being held in custody on this charge. Bail has/has not been denied. Bail was set in the amount of _____.

People of the State of Michigan v
File No.

The Defendant was released on pre-trial bail on _____.

TRANSCRIPT PREPARATION: Grand Jury transcripts have/have not been ordered and have/have not been prepared. Grand Jury transcripts will be prepared by name of recorder and District Court and filed with the Court not later than _____.

ARRAIGNMENT TRANSCRIPTS: Have/Have not been ordered and have/have not been prepared. Arraignment transcripts shall be prepared by name of recorder and which District Court and filed not later than _____.

BAIL HEARING TRANSCRIPTS: Have/Have not been ordered and have/have not been prepared. Bail hearing transcripts shall be prepared by name of recorder and District Court and filed not later than _____.

PRELIMINARY EXAMINATION TRANSCRIPTS: Have/Have not been ordered and have/have not been prepared. Preliminary Examination Transcripts shall be prepared by name of recorder and which District Court and filed not later than _____.

BAIL HEARING: Pursuant to 1963 Mich. const. art. 1, sec. 15 and MCR 6.106 a bail hearing will be held on _____. Either party desiring to produce witnesses and/or evidence at the bail hearing shall be prepared to present witnesses and evidence.

WITNESSES: The Prosecutor has filed a list of witnesses with the information/indictment. The list contains approximately ___ names. The Prosecutor shall comply with MCL 767.40a(3) not later than _____.

Not later than _____ pursuant to MCL 767.40a(5) Defense Counsel may make any request

for assistance from the Prosecutor in locating and serving process upon any witnesses the Defense requests for trial. This list shall include any witnesses included in the Prosecutor's list and/or any witnesses to events such as statements allegedly made by the Defendant in the presence of other individuals.

DISCOVERY: Any requests for discovery pursuant to MCR 6.201 must be made not later than _____. Any other discovery requests must be made within the motion filing deadline contained within this order and the ARRAIGNMENT ORDER limiting time for motions.

MOTIONS AND NOTICES: All pre-trial motions are to be filed not later than ____. Each motion shall be accompanied by a praecipe for hearing. A brief in support of each motion filed shall be filed by the moving party contemporaneously with the motion. A copy of the brief shall be provided to the Court's law clerk. The opposing party shall file a brief within 14 days of receiving the moving party's brief. All briefs shall be filed not later than seven days before any scheduled hearing date, notwithstanding any other provision in this Scheduling Order.

Notices of Alibi MCL 768.20 and Insanity MCL 768.20A shall be filed not later than ____. Failure to timely file such notice shall be deemed a waiver of the defense.

PRE-TRIAL CONFERENCE: A pre-trial conference will be held on day/date/time .

The Prosecutor and Defense shall be prepared to present to the Court at the date pre-trial conference any and all photographs the parties intend to use at trial for a pre-trial ruling on objections to any photographs and the admissibility of photographs intended to be used by the parties at trial.

People of the State of Michigan v
File No.

SETTLEMENT CONFERENCE: Settlement Conference in this matter will commence on day/date/time.

TRIAL: Trial in this matter shall commence on day/date/time .

This Scheduling Order is being entered by the Court to comply with MCR 6.004 which provides the Defendant and the People with a right to a speedy trial and to a speedy resolution of all matters before the Court. This Scheduling Order may be supplemented by other scheduling orders and/or pre-trial conference orders. Any party objecting to the contents of this Order may file a written motion specifying the objections and the relief requested. Any and all motions objecting to this Order and requesting relief from this Order will be filed within seven days of the receipt of this Pre-Trial Order. The motion shall be noticed for a hearing as soon as possible after filing. Failure to file objections and a request for relief from this Order within the time provisions allowed in this Order constitutes a waiver of objections.

Dated: _____

_____
Richard Ryan Lamb
Circuit Court Judge

xc: Jeffrey R. Fink, Prosecuting Attorney
, Defense Attorney
Lisa Owsiany, Assignment Clerk
, District Court Recorder/Reporter

STATE OF MICHIGAN 9TH CIRCUIT COURT - TRIAL DIVISION KALAMAZOO COUNTY	WAIVER OF ARRAIGNMENT AND ELECTION TO STAND MUTE ☐ INFORMATION ☐ SUPPLEMENTAL INFORMATION	CASE NO. CIRCUIT: DISTRICT: JUDGE:

Court Address 227 West Michigan Avenue, Kalamazoo, Michigan 49007 (269) 383-8950 Court telephone no.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff Name of Assistant Prosecutor Present	Defendant: ☐ IN JAIL ☐ ON BOND Name of Defense Counsel Present

The undersigned defendant and attorney, pursuant to MCR 6.113(C), hereby state and certify as follows:

They have received a copy of the information and/or Supplemental Information in the above entitled cause; each has read said information or had it read or explained to him, and understands the substance of the charge contained therein; and Defendant waives arraignment in open court and stands mute to the charge.

Transcript(s) ORDERED ☐ Yes ☐ No	District Court Arraignment Transcript	☐ Yes ☐ No
	Preliminary Exam Transcript	☐ Yes ☐ No

NOTES:

DATED: _____

_____
Defendant

Address: _____

_____

Phone: _____

_____
Attorney for Defendant

ENTRY OF PLEA: ORDER LIMITING TIME FOR MOTIONS AND NOTICES

ALL MOTIONS AND BRIEFS, REQUESTS FOR WALKER HEARING, NOTICES OF INSANITY, ALIBI AND INTENT TO USE EVIDENCE OF OTHER ACTS PURSUANT TO MRE 404(b) MUST BE WRITTEN SPECIFYING FACTUAL AND LEGAL ISSUES AND MUST BE FILED AND PRAECIPED FOR HEARING WITHIN 21 DAYS OF THIS DATE. MOTIONS TO IMPEACH CAN BE HEARD ON THE DAY OF TRIAL OR AS OTHERWISE ORDERED BY THE COURT.

DATED: _____

_____
Circuit Judge

CIRCUIT COURT CLERK - YELLOW *PROSECUTOR-PINK* *DEFENSE ATTORNEY/DEFENDANT - GREEN*

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.1307a Qualifications of juror; exemption; effect of payment for jury service; "felony" defined.

Sec. 1307a.

(1) To qualify as a juror a person shall:

(a) Be a citizen of the United States, 18 years of age or older, and a resident in the county for which the person is selected, and in the case of a district court in districts of the second and third class, be a resident of the district.

(b) Be able to communicate in the English language.

(c) Be physically and mentally able to carry out the functions of a juror. Temporary inability shall not be considered a disqualification.

(d) Not have served as a petit or grand juror in a court of record during the preceding 12 months.

(e) Not have been convicted of a felony.

(2) A person more than 70 years of age may claim exemption from jury service and shall be exempt upon making the request.

(3) For the purposes of this section and sections 1371 to 1376, a person has served as a juror if that person has been paid for jury service.

(4) For purposes of this section, "felony" means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.

History: Add. 1978, Act 11, Imd. Eff. Feb. 8, 1978 ;-- Am. 1986, Act 104, Eff. Jan. 1, 1987 ;-- Am. 2002, Act 739, Eff. Oct. 1, 2003 ;-- Am. 2004, Act 12, Eff. June 1, 2004

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.1312 Key number; first jury list; compilation.

Sec. 1312.

The board shall apply the key number uniformly to the names on the list received pursuant to section 1310 and compile a list or card index, to be known as the first jury list, which shall include every name and only those names as the application of the key number has designated. The board shall do this as follows:

(a) Select by a random method a starting number between 0 and the key number.

(b) Count down the list the number of names to reach the starting number. That name shall be placed on the first jury list.

(c) Continue from that name counting down the list, beginning to count again with the number 1, until the key number is reached. That name shall be placed on the first jury list.

(d) Repeat the process provided in subdivision (c) until the whole list has been counted and the names placed on the first jury list.

(e) The board shall then remove from the first jury list the name of any person who its records show served, pursuant to the provisions of this chapter, as a petit or grand juror in any court of record in the county at any time in the preceding 1 year.

(f) The board, with the approval of the chief circuit judge, may remove from the first jury list the name of any person who has been convicted of a felony and is therefore disqualified from serving as a juror pursuant to section 1307a(1)(e).

History: Add. 1968, Act 326, Eff. Nov. 15, 1968 ;-- Am. 1969, Act 326, Eff. Sept. 1, 1969 ;-- Am. 1986, Act 104, Eff. Jan. 1, 1987 ;-- Am. 2004, Act 12, Eff. June 1, 2004 ;-- Am. 2005, Act 6, Imd. Eff. Apr. 7, 2005

Rule 6.414 Conduct of Jury Trial

(A) Before trial begins, the court should give the jury appropriate pretrial instructions.

~~(A)~~(B) [Relettered but otherwise unchanged.]

~~(B)~~(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.

~~(C)~~(D) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes and that they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors ~~both~~ to keep their notes confidential except as to other jurors during deliberations ~~and to destroy their notes when the trial is concluded~~. The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.

(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

~~(D)~~(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer ~~designated by the court~~ in charge of the jurors, or any person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.

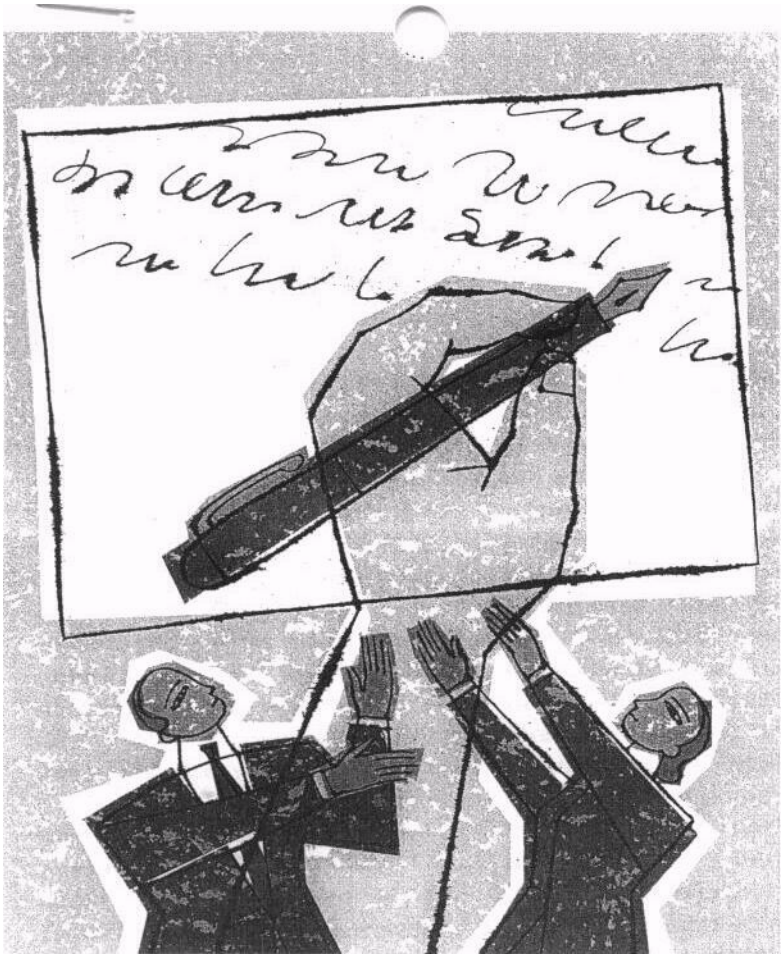
~~(E)~~(G)Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable time limits on the closing arguments.

~~(F)~~(H) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must

inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but ~~with the parties' consent~~ at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments**,** and give any appropriate further instructions after argument. After jury deliberations begin, the court may give additional instructions that are appropriate.

~~(G)~~(I)-~~(H)~~(J) [Relettered but otherwise unchanged.]

Adopted July 13, 2005. Effective January 1, 2006.



The case for allowing jurors to submit written questions

by EUGENE A. LUCCI

Juror questioning of witnesses is neither a new nor an innovative concept in the common law and American jurisprudence.' Jurors have questioned witnesses in England since the eighteenth century, and the practice has existed in America since 1825.[2]

At common law, those charged with capital crimes were not afforded counsel unless legal issues needed debating. The judge and jury were authorized to ask questions. With the lack of counsel and few procedural and evidentiary rules, criminal trials were solely in the hands of judges. As the English court system evolved, more emphasis was placed on fair procedure. Defense counsel played an increasing role, while the role of jurors as active participants diminished. The emphasis on the quality of evidence, shaped by examination by counsel, relegated the juror to the role of passive, neutral observer.[3]

The practice of juror questioning of witnesses in federal courts dates back as far as 1954.[4] By allowing juror questioning, courts sought to promote clarification of facts and the discovery of truth. At least 30 states and the District of Columbia permit jurors to question witnesses. A few states prohibit the practice.[5] Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion.[6] In most military hearings, members of court-martial panels have the opportunity to question witnesses.[7]

> To the extent that jurors' questions assist in the search for truth, those questions should be asked.

The first American court to address the validity of jury questioning of witnesses, in 1895, asserted that the practice was not prejudicial to either party in the suit and emphasized that it was a commendable practice since it helped the jury to "properly determine the case before them."[8]

Originally, juror questioning was known as "juror outbursts," which gives some idea as to the formality of the

1.M. Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (C. Gray ed. 1971) (1st ed. 1713) ("[b]y this Course of personal and open examination, there is Opportunity for all Persons concerned, viz, The Judge, or any of the Jury ... to propound occasional questions, which beats and boults out the Truth").

2. *See* 3 Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 373 (William D. Lewis ed. 1922) (1765) (commenting on the practice in English history); Barry A- Cappello &James G. Strenio, *Juror Questioning: The Verdict Is In,* 36 TRIAL 44 (2000) (commenting on the practice in American history).

3. Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases,* 78 FLA. B.J. 8 (Feb. 2004).

4. *State v. Witt,* 215 F.2d 580 (2d Cir. 1954).

5. Sarah E. West, *The Blindfold on Justice is not a Gag: The Caes for Allowing Controlled Questioning of Witnesses by Jurors,* 38 TULSA L.,. REV. 529 (2003).

6. Emma Cano, *Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questioning of Witnesses in Criminal Cases?* 32 TEX. TECH L. REV. 1013, 1017-18 (2001).

7. Robinson 0. Everett, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 185-186 (1956).

procedure. If a juror had a question, the juror would simply blurt it out in open court. During the 1950s and 1960s, courts began establishing more formal procedures. The earliest case in which a court created formal procedures for juror questioning was decided in 1926.[9]

Controlling the process

Certain procedural safeguards can reduce or eliminate the risks of jury questioning of witnesses. The demeanor of the judge and how the judge addresses the issue make the difference. The judge decides whether a witness should be asked questions posed by jurors. This applies to both civil and criminal cases. The judge should give preliminary limiting instructions about the procedure being available, what questions will be allowed, and the technical rules involved. He or she should explain that questions are not encouraged but are to be sparingly used. Jurors should be told that they are not advocates, and must remain neutral. They should also be told that they are not to draw any inference if their question is not asked, because the rules of evidence and rulings by the judge in the case will limit even the parties' questioning, and that they are not to reveal any unasked question to the other jurors.

Jurors should be told that the judge is the "gatekeeper" and determines which questions will be asked, and in what format. Juror questions should be limited to matters attested to during direct and cross-examination, and to clarifying information already presented. The questions should be of the type that a fact-finder, and not an advocate, would ask. They should be factual, not argumentative. Questions should not be asked to express views on the case or to argue with a witness. The juror questions should come only after the witness is finished testifying, but before that witness leaves the stand.

Questions should be in writing, collected by the bailiff and submitted directly to the judge, and never to the witness. Questions should not be discussed with the other jurors and should not be signed. The parties should be given the opportunity to object to the questions, outside the hearing of the jurors, and the questions should be made a part of the record. The judge, and not the attorneys or jurors, should pose the questions to the witness in a neutral, non-intimidating, non-argumentative manner. Each party should have the opportunity to further question the witness on issues raised by the juror questions. The trial court should, in its discretion, withhold juror questioning of witnesses if it will not be beneficial to the case and aid jurors in the execution of their responsibility. Juror questioning is simply an extension of the court's own power to question witnesses in accordance with the rules of procedure.

Observations

I am currently in my fifth year of allowing jurors to propose written questions, and have done so in well over 100 trials.[10] Over that period I have made the following observations: (1) the vast majority (over 90 percent) of juror questions are good questions and many are excellent;
(2) most questions seek clarification of testimony regarding topics that have already been touched upon by the witness, including testimony not heard or which was vague or ambiguous; (3) when jurors submit questions that seek to inquire into areas not already covered by a witness's testimony, it is rarely because counsel intentionally avoided inquiry into those areas as part of a trial strategy—instead, it is often because counsel has simply overlooked inquiring into those areas, i.e., "not seeing the forest for the trees"; (4) trial counsel often appreciate the opportunity to get mid-stream glimpses of how the jurors are processing the information coming into evidence and being able to shore up a point they thought they were making, and after experiencing jury questioning of witnesses first-hand, most attorneys approve of and embrace the practice; and (5) jurors universally approve of and appreciate the ability to clear up confusion by asking questions, and, combined with the ability to take notes and having written jury instructions on the law, when jurors are allowed to ask questions they feel very satisfied that they reached the correct verdict." In short, I have found that juror questioning has not led to a breakdown of the adversarial system.

Juror questioning of witnesses is especially helpful: (1) when the trial is lengthy or complex; (2) attorneys are unprepared or obstreperous; (3) facts become confused and neither

8. Schaefer v. St. Louis & Suburban Railway Company, 30 S.W. 331 (Mo. 1895). See also Chi., Milwaukee & St. Paul R.R. Co. v. Krueger, 23 IlLApp. 639 (1887); Miller v. Cmmw., 222 S.W. 96 (Ky. 1920); Chi. Hansom Cab Co. v. Havelick, 131 Ill. 179 (1889); State v. Kendall, 57 S.E. 340 (N.C. 1907).

9. West, *supra* n. 5.

10. I have used most of the innovations suggested by the 2004 "Report and Recommendations of the Ohio Supreme Court's Task Force on Jury Service." In its report, the task force strongly recommended that the following policy be adopted by Ohio courts: "Jurors are entitled to ask questions of witnesses unless the court, in its discretion, finds in a specific case that the process will not contribute to the search for truth." In support of this recommendation, the task force referred to the overwhelmingly positive response of jurors, judges, and the moderately positive response of trial attorneys, to the use of juror-initiated questions during the Ohio pilot project from April until mid-November 2003.

11. In my court, all jurors are mailed an anonymous exit survey to complete and return.

side is able to resolve the confusion, (4) to resolve ambiguity in testimony and bring forth additional relevant information; (5) when jurors misunderstand the words used by the attorney or witness, or fail to hear a word;
(6) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused; and (7) when attorneys for both sides avoid asking the witness a material question because the attorneys do not already know the answer.

Reasons for opposition

Unpredictable testimony. Some attorneys oppose jury questioning of witnesses because they think it will upset their well-laid plans in the construction of their case and its execution. But the attorneys are not the sole arbiters of the scope and content of testimony. The judge can ask questions. And in the judge's discretion, the jury also can ask questions. In addition, live testimony is inherently unpredictable. Juror-inspired questions do not inevitably mar the careful orchestrations of trial counsel. If testimony in court were so predictable, then trial counsel would have no need for carefully-indexed and cross-referenced depositions, and all witnesses would testify via pre-recorded video. The parties do not get to "choose" what the witnesses say when they testify. Nor should they get to decide whether the jury inquires of the witness. In addition, the mere fact that testimony was elicited by a juror's question does not mean that the entire jury will not properly compare and weigh that testimony along with everything else in the trial.

Delay. Some advocates have argued that allowing jurors to submit written questions is inefficient and will result in needless interruption and delay.[12] However, that has not been my experience. The trial is not "interrupted" or "delayed" by juror questions, any more than the trial is "interrupted" by objections from counsel, or "delayed" by requiring counsel to lay the foundation for admitting an exhibit, or by lengthy sidebar discussions. When allowed by the judge, juror questions are an integral part of the trial process. Questioning is likely to save time with improved understanding by the jurors, reduced questioning of other witnesses, and shorter jury deliberations.

Premature deliberation. Another objection has been that the very process of formulating questions invites a juror to begin deliberating before all the evidence has been submitted. But jury deliberation is far more than merely giving consideration to the evidence. Jurors necessarily give consideration to the evidence as it comes in. As individuals, they watch, listen, assess demeanor, and give private consideration to everything that happens in the courtroom. They also inevitably formulate questions in their mind about the evidence. Occasionally, in courts where juror questions are allowed, they articulate those questions to the judge, and sometimes their questions get asked and answered. Jury deliberation is the *group process* of formulating answers to the questions posed by the evidence and the law. In fact, group deliberations cannot take place effectively unless individual jurors already have begun to formulate questions in their minds about the evidence. When a witness answers an individual juror's questions, it helps to lay the proper foundation for effective deliberations by the jury as a group. Juror questioning of witnesses is no more indicative of a prematurely made-up mind of a juror than a judge's questioning of witnesses in a bench trial is of the judge's premature decision.

Curing confusion

If the jury is confused about the evidence, then jurors should be allowed to ask questions designed to alleviate the confusion. If, after clarifying their confusion, the jury is not persuaded, then they should decide against the party with the burden of persuasion. The idea that justice is somehow served by a confused jury that is not allowed to express its confusion and seek clarity of understanding is flat wrong. If the failure to persuade results from curable juror confusion, then the party with the burden of proof is not the only one who suffers. The entire community suffers because a miscarriage of justice has occurred. And that miscarriage of justice will undermine public confidence in the judicial system as disgruntled parties and lawyers and jurors all become ambassadors of cynicism. To say that the party with the burden of persuasion or proof must make its points clear or suffer the loss at trial ignores the fact that a jury may just as easily rule in favor of the opposing party (the one without the burden) if the jurors are confused about the evidence."

The burden of proof

Some say that the duty of the petit jury is to decide not what the truth is, but whether the party with the risk of non-persuasion has satisfied its burden of proof.[14] Of course, such an artful framing of the question conflicts directly with the common experience of jurors. That is not how jurors think. In deciding whether the party with the burden of proof has met its burden, the jury also must decide what the truth is. How else can they possibly decide that the burden has been met? The "burden of proof is the burden of proving that something is true.

In deliberations, the jury does more than merely assess the credibility of the witnesses and weigh the evidence. The jury also uses its common experience to assemble the testimony and evidence into a coherent representation of reality. Often, as a necessary precondition for deciding whether the burden of proof has been met, the jury first decides which party has presented the most coherent representation of reality—the one that best accounts for the testimony and the facts in evidence. Indeed, the closing argu-

12. **Richard** S. Walinski, *Questioning by Jurors: A flawed. Idea.* 19 OHIO LAWYER, 32 (Jan/Feb 2005).
13. Walinski, *id.,* seems to assume that any confusion will always inure to the detriment of the party with the burden of proof, so that there is no risk in confusion to the party without the burden.
14. *Id***.**

ments of counsel are often an effort to influence the jury in deciding which party's version of the truth best accounts for the testimony and the evidence.

It should be no surprise that an experienced advocate—whose relationship with the "search for truth" is necessarily subordinated to his duty to represent his client—would downplay the truth-seeking function of a trial judge and a petit jury in the courtroom. It serves his or her purposes to reduce the truth-seeking function of the judge and jury to the most passive role possible. For an advocate, the search for truth is helpful only to the extent that the truth is on the side of his client. And in a jury trial, the truth serves only one party at best. To quote Judge Marvin E. Frankel, "[T]ruth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time."[15]

If the "search for truth" has no place in a jury trial, then one would expect that statement to have persuasive value in a closing argument to a jury. Counsel could use a portion of closing argument to "remind" the jury that their deliberative duties have nothing to do with searching for the truth. Of course, such an argument would likely offend the sensibilities of most petit jurors who—as the bedrock of the common law—are not generally conversant with the skewed, anti-truth perspective of an advocate.

In short, jurors are naturally and commonly concerned with figuring out, based on the evidence and the testimony, what really happened. Certainly, they must do so within the structure of deciding whether the party with the burden of proof has proved his case, but the mere fact that this structure exists does not eliminate the jury's search for enough truth to decide what really happened. Juror questioning of witnesses helps the trial to be more than a mere contest of advocacy; it helps the trial to maintain a proper focus on the search for truth.[16]

Confusion vs. "reasonable doubt"

Criminal defense attorneys frequently object to jury questioning of witnesses because they think juror confusion will inure to the benefit of the defendant by creating reasonable doubt. The premise is faulty—not all juror confusion will result in an acquittal. Further, jurors are instructed on the law: Reasonable doubt "is a doubt based on reason and common sense."17 Reasonable doubt is not a doubt based on confusion, misinformation, and ambiguity. In the conduct of the most important of a juror's own affairs, would the juror act upon confusion, misinformation, and ambiguity—or would the juror seek clarity by asking questions? The hallmark of the American trial is the pursuit of truth.18 Such truth—and, in the end, justice—is attainable in all cases, including criminal, only if the jury makes its decision based on reason and common sense.

The search for truth

Notwithstanding the partisan role of the advocates, and the rules protecting various rights, one of the main objects of the litigation process is still the search for truth.[19] To the extent that a juror's question assists in the search for truth, and to the extent that the trial judge exercises his or her discretion to allow it, the juror's question should be asked.

Certainly, there are benefits of juror questioning of witnesses. Questioning facilitates juror understanding, attentiveness, and overall satisfaction, improves communications, and corrects erroneous juror beliefs. Some contend it promotes the search for truth and justice.

When a court allows jurors to pose written questions, the court is neither abolishing the common practice of muzzling jurors, nor is it adding a new practice. The court is exercising its discretion to use a centuries-old, common law procedure to enhance the truth-seeking function of the jury trial.[20] The search for truth is central to the legitimacy of a trial's function. If the trial does not effectively develop the facts and comprehensibly present them to the factfinder, justice is serendipitous. Any concerns that jurors might become advocates for one party or another are alleviated by the role of the judge who decides whether the question should be asked, and if so, then how the question should be asked.[21] In short, when a judge asks questions that have been submitted by a juror, it is a procedure that has historically and traditionally been committed to the sound discretion of the trial court to serve the search for truth.[22] The fact that the question originated with a juror is less important than the fact that the judge deems the question worthy of being asked.

EUGENE A. LUCCI
is a judge of the General Division of the Common Pleas Court, Lake County, Ohio.
(judgelucci@lakecountyohio.org)

15. *The Search For Truth: An Umpireal View,* 123U. **PA. L.** REV. 1031 (May 1975).

16. Carrie Shrallow, *Expanding jury Participation: Is It a Good Idea?* 12 U. BRIDGEPORT L. REV. 209, fn 183 (1991).

17. Revised Code Section 2901.05(D) defines "reasonable doubt" as being "present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt- 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his (or her) own affairs."

18. *State v. Fisher,* 99 Ohio St.3d 127, 2003-Ohio-2761.

19. *United States v. Callahan*, 588 F.2d 1078, 1086 *(5th Cir. 1979);* Sims v. ANR Freight Systems, Inc., *77 F.3d 846 (5lh Cir. 1996);* Morse Boulger Destructor Co. v. Arnoni, *376 Pa. 57, 101 A.2d 705).*

20. *See,* Blackstone, *supra* n. 2 ("[T]he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled. . . .").

21. *United States v. Bush* (1995), 47 F.3d 511.

22. *United States v. Sutton* (1992), 970 F.2d 1001, 1005. In the context of expressing reservations about allowing jurors to ask questions in criminal trials, the court also acknowledged in footnote 3, "To be sure, the balance is not completely one-sided. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the juror's minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror."